

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0614

LAWRENCE ROEDEL,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Katherine R. Curtis, Presiding

APPEARANCES:

STEVE BULLOCK
Montana Attorney General
JOHN PAULSON
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

LAWRENCE ROEDEL
AO# 2110712
50 Crossroads Drive
Shelby, MT 59474

PETITIONER AND APPELLANT
PRO SE

ED CORRIGAN
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell MT 59903-1516

ATTORNEYS FOR RESPONDENT
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
STANDARDS OF REVIEW	5
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
THE DISTRICT COURT PROPERLY DENIED ROEDEL’S PETITION FOR POSTCONVICTION RELIEF	8
A. The District Court’s Order and Rationale	9
B. Failure of Appointed Counsel	13
C. Response to State Rationale	15
D. The State’s “Firing All Three Shots” Theory	17
E. The Rapid Fire Testimony	18
F. Deceased on Exterior When Shot	19
G. Wrongful Arrest	19
H. Insufficiency of Evidence	20
I. Misdirected Analysis of Website and Character.....	20
J. Two Exit Hole Accounts	21

TABLE OF CONTENTS
(Cont.)

K.	Rod Meyers' Jury Influence.....	21
L.	Attempt on Petitioner's Life	22
M.	Immediate Collapse Theory	23
N.	Side Impact Theory	23
O.	Summary	24
CONCLUSION.....		24
CERTIFICATE OF SERVICE		25
CERTIFICATE OF COMPLIANCE.....		25
APPENDIX.....		26

TABLE OF AUTHORITIES

CASES

Baca v. State, 2008 MT 371, 346 Mont. 474, 197 P.3d 948.....	6, 7
DuBray v. State, 2008 MT 121, 342 Mont. 520, 182 P.3d 753.....	7
Hamilton v. State, 2010 MT 25, 355 Mont. 133	9
In re Petition of Gillham, 216 Mont. 279, 704 P.2d 1019 (1985)	2
In re Petition of Martin, 240 Mont. 419, 787 P.2d 746 (1989)	14, 15
Marble v. State, 2007 MT 98, 337 Mont. 99, 169 P.3d 1148.....	2
Robinson v. State, 2010 MT 51, ____ Mont. ____, ____ P.3d ____	5
State v. Bennett, 158 Mont. 496, 493 P.2d 1077 (1972)	20
State v. Bonamarte, 2009 MT 243, 351 Mont. 419, 213 P.3d 457.....	6
State v. Cybulski, 2009 MT 70, 349 Mont. 429, 204 P.3d 7.....	8
State v. Dodson, 2009 MT 419, 354 Mont. 28, 221 P.3d 687.....	8
State v. Godfrey, 2009 MT 60, 349 Mont. 335, 203 P.3d 834.....	6, 19

TABLE OF AUTHORITIES **(Cont.)**

State v. Hanson, 1999 MT 226, 296 Mont. 82, 988 P.2d 299.....	9
State v. Makarchuk, 2009 MT 82, 349 Mont. 507, 204 P.3d 1213.....	17
State v. Rennaker, 2007 MT 10, 335 Mont. 274, 150 P.3d 960.....	16
State v. Roedel, 2007 MT 291, 339 Mont. 489, 171 P.3d 694.....	1, 3, 10, 22
Strickland v. Washington, 466 U.S. 668 (1984).....	6, 15
Whitlow v. State, 2008 MT 140, 343 Mont. 90, 183 P.3d 861.....	6

OTHER AUTHORITIES

Montana Code Annotated

§ 46-21-103	9
§§ 46-21-104	9
§ 46-21-104(1)(c)	1
§ 46-21-105(2)	9
§ 46-21-105(2)	14, 15, 20, 22
§ 46-8-104	14

Montana Rules of Appellate Procedure

Rule 12(1).....	8
-----------------	---

STATEMENT OF THE ISSUES

Did the district court properly deny Roedel's petition for postconviction relief?

STATEMENT OF THE CASE

In April 2006, a Flathead County jury convicted Lawrence Roedel of the deliberate homicide of his wife, Dawn Thompson, at their home near Bigfork, Montana. Roedel was sentenced to 80 years at the Montana State Prison, plus a consecutive term of 10 years for the use of a weapon. On November 27, 2007, this Court affirmed the conviction and sentence. State v. Roedel, 2007 MT 291, 339 Mont. 489, 171 P.3d 694.

On November 7, 2008, Roedel filed a pro se petition for postconviction relief in the Eleventh Judicial District Court, Flathead County. (D.C. Doc. 1.) On November 21, 2008, the district court issued an order granting Roedel a period of 30 days within which to file an amended petition in compliance with Mont. Code Ann. § 46-21-104(1)(c), which requires a postconviction petition to have attached affidavits, records, or other evidence establishing the existence of the facts relied upon in the petition. (D.C. Doc. 3.) On December 22, 2008, Roedel filed a pro se amended petition for postconviction relief, attaching copies of the trial transcript and his handwritten correspondence with his appellate counsel. (D.C. Doc. 7.)

Roedel also requested the appointment of postconviction counsel (D.C. Doc. 4), and the district court issued an order conditionally appointing the Office of the State Public Defender and extending the time for filing an amended petition to February 2, 2009. (D.C. Doc. 6.) On January 23, 2009, Glen Neier, a state public defender, filed a notice of appearance. (D.C. Doc. 9.) On February 2, 2009, Neier filed a motion for an extension of time for filing an amended petition for postconviction relief, noting that Roedel's pro se claim of ineffective assistance of appellate counsel created a conflict of interest and that Roedel was ineligible for appointed counsel at that time in the postconviction proceedings. (D.C. Doc. 11.) Finding that Roedel's previously filed pro se amended petition raised the ineffective assistance claim against appellate counsel and that there was no basis for another amended petition, the district court denied the motion for extension of time on June 9, 2009, and ordered the State to file a response to the amended petition. (D.C. Doc. 15.) Neier eventually filed a motion for an order allowing him to withdraw (D.C. Doc. 27), which the court granted on December 7, 2009. (D.C. Doc. 30.)

The State requested and obtained a Gillham order (In re Petition of Gillham, 216 Mont. 279, 704 P.2d 1019 (1985); Marble v. State, 2007 MT 98, 337 Mont. 99, 169 P.3d 1148) to permit Roedel's trial counsel, John R. Quatman, and Roedel's appellate counsel, Joslyn Hunt, to respond to Roedel's allegations of

ineffective assistance of counsel. (D.C. Doc. 17.) The State filed a response, followed by a supplemental response, attaching the affidavits of Quatman and Hunt along with other documents supporting the affidavits. (D.C. Docs. 20, 21.) Copies of the affidavits are included in the appendix to this brief.

Roedel filed two pleadings in reply to the State's responses. (D.C. Docs. 22, 23.) On October 9, 2009, the district court issued its Order and Rationale denying Roedel's amended petition for postconviction relief. (D.C. Doc. 24.) A copy of the Order and Rationale is included in the appendix to this brief.

Roedel filed a second supplement to his pleadings (D.C. Doc. 25) and a notice of appeal. (D.C. Doc. 26.) The notice of appeal was filed in the district court on October 30, 2009, and received by the clerk of this Court on November 5, 2009. (D.C. Doc. 28.)

STATEMENT OF THE FACTS

The facts concerning the homicide and the subsequent proceedings, briefly summarized below, are set forth in this Court's opinion on direct appeal. Roedel, ¶¶ 9-34.

Shortly after 11 p.m. on August 27, 2005, Roedel called the Lake County Sheriff's Office 911 dispatch and stated that he had just shot his wife, Dawn Thompson, at their house in Fernwood, near Bigfork. He stated that

Dawn had come into his room pointing a gun in his face, that they had wrestled over the gun, and that the gun had discharged.

Officers responding to the call found Dawn's body on the bottom steps of a staircase leading from the garage to an upper bedroom. The gun was on the bed in the bedroom. Three bullet holes were in the wall above the landing where Dawn's body was found.

Roedel told the officers that he and Dawn had argued that evening, and he had shot her in the back as she descended the stairs. Initially Roedel claimed that Dawn had fired the first two shots during the altercation, but he later admitted that he had fired the gun all three times. Two neighbors, Ray and Karen Kliev, testified that they had heard three shots in rapid succession from a high-powered handgun. Other neighbors testified that they had heard only two shots, with a longer interval between the shots. The gun, a .357 magnum that Roedel kept in a desk drawer next to his bed, had three spent cartridges in the cylinder.

The gun was examined by a firearms expert, who testified that the gun could not fire unless something pulls the trigger. The gun does not discharge even if it is dropped with the hammer cocked.

The state medical examiner testified that Dawn was killed by a single bullet that entered the back of her right shoulder and caused extensive damage as it

passed through her body. The cause of death was internal bleeding into the cavities around her lungs.

A forensic chemist with the state crime lab testified that she found more particles of likely gunshot residue on Dawn's hands than on Roedel's hands. She could draw no conclusions about who fired the gun, since gunpowder residue may be transferred and removed through ordinary activities with the hands.

Roedel retained attorney John R. Quatman to represent him during the trial proceedings. Quatman submitted an affidavit describing his representation and addressing various claims of ineffective assistance of counsel alleged by Roedel in his amended petition. Similarly, Roedel's appellate counsel, Joslyn Hunt from the Appellate Defenders Office, submitted an affidavit to address Roedel's claims against her.

Additional facts will be discussed as necessary in the argument below.

STANDARDS OF REVIEW

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and its conclusions of law are correct. Robinson v. State, 2010 MT 51, ¶ 10, ___ Mont. ___, ___ P.3d ___. Claims of ineffective assistance of counsel (IAC) present mixed questions of fact and law that are reviewed de novo on appeal. Id.

Discretionary rulings in the postconviction relief setting, such as whether to hold an evidentiary hearing, are reviewed for abuse of discretion. State v. Godfrey, 2009 MT 60, ¶ 10, 349 Mont. 335, 203 P.3d 834. A district court abuses its discretion when it acts arbitrarily or unreasonably, without employment of conscientious judgment, and a substantial injustice results. State v. Bonamarte, 2009 MT 243, ¶ 13, 351 Mont. 419, 213 P.3d 457.

To review IAC claims, this Court applies the two-prong test set out in Strickland v. Washington, 466 U.S. 668 (1984), which requires the defendant to establish that counsel's performance was deficient and that the deficient performance prejudiced the defense. Baca v. State, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948, citing Whitlow v. State, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. The defendant must satisfy both prongs of the test and bears a heavy burden in seeking to overturn a district court's ruling on a postconviction IAC claim. Id.

The performance prong of the test requires a determination as to whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances, and the Court indulges a strong presumption that counsel's actions fell within the broad range of reasonable professional assistance. Baca, ¶ 17. The defendant must overcome the presumption that the challenged act or omission might be considered

sound trial strategy. Id. The prejudice prong of the test requires the defendant to demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Id.

The criteria for establishing ineffective assistance of appellate counsel are the same as those used to establish ineffective assistance of trial counsel. An IAC claim against appellate counsel requires a showing that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's unprofessional errors, the defendant would have prevailed on appeal. DuBray v. State, 2008 MT 121, ¶ 31, 342 Mont. 520, 182 P.3d 753. Appellate counsel has no constitutional obligation to raise every nonfrivolous issue on appeal, and the presumption of effective assistance will be overcome only when ignored issues are clearly stronger than those presented. Id.

SUMMARY OF THE ARGUMENT

The district court's findings on Roedel's claims of ineffective assistance are well supported by the record and are not clearly erroneous. As reflected in their affidavits, both trial counsel and appellate counsel acted well within the broad range of reasonable professional assistance during their representation of Roedel. While Roedel raises other claims and assertions in this appeal, they are largely based on speculation and off-record matters that go beyond his amended petition's

IAC claims and are not properly before the Court. This Court should affirm the district court's order denying postconviction relief.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED ROEDEL'S PETITION FOR POSTCONVICTION RELIEF.

The district court exhaustively considered Roedel's various pro se postconviction IAC claims in light of the record, including the affidavits of trial and appellate counsel, and found no grounds for relief from the homicide conviction. This Court should affirm.

Initially, it is apparent that the State's response to Roedel's pro se appellant's brief is complicated by Roedel's noncompliance with Mont. R. App. P. 12(1), which requires identification of the issues, a statement of the standard of review, and a succinct, clear, and accurate statement of the arguments made in the body of the brief, with citations to authorities, statutes, and pages of the record relied upon. This Court would have discretion to decline consideration of such arguments that do not comply with Rule 12(1). State v. Dodson, 2009 MT 419, ¶ 26, 354 Mont. 28, 221 P.3d 687, citing State v. Cybulski, 2009 MT 70, ¶¶ 13, 15, 349 Mont. 429, 204 P.3d 7. Roedel's brief largely ignores the district court's Order and Rationale, converting his postconviction IAC claims into substantive and largely conclusory arguments on appeal. The brief does not challenge the

court's specific findings and conclusions as clearly erroneous or legally incorrect. Instead, most of the brief is a rehash of Roedel's views on the trial evidence, Roedel's personal thoughts and observations, and Roedel's current theory of the crime, with occasional references to matters not in the record and accusations of illegal or unethical conduct by Roedel's attorneys, the prosecutor, and the police.

Consequently, the State's response will first summarize the district court's ruling and then briefly address the matters asserted under the various headings in Roedel's brief.

A. The District Court's Order and Rationale

The district court correctly recognized that Roedel's amended petition, with its absence of verification and supporting documents establishing the facts, is subject to summary dismissal without an evidentiary hearing in accordance with the procedural threshold requirements of Mont. Code Ann. §§ 46-21-103 and -104. Hamilton v. State, 2010 MT 25, 355 Mont. 133, ___P.3d___; State v. Hanson, 1999 MT 226, ¶ 21, 296 Mont. 82, 988 P.2d 299. However, the court determined to review the merits of Roedel's various claims in view of the seriousness of the offense and the fact that Roedel was representing himself.

The court found several of the claims to be barred from postconviction review by Mont. Code Ann. § 46-21-105(2), which forecloses claims that were or could have been raised by the defendant on direct appeal. The court listed the

barred claims, which included IAC claims against trial counsel and various allegations of withheld Brady material. The court then considered Roedel's argument that the barred claims should be reviewed because his appellate counsel was ineffective for failing to raise them in the direct appeal. The court found that many of the claims were addressed on direct appeal in the context of the argument that the evidence at trial was insufficient to support the conviction. The court noted that Roedel's appellate counsel rejected other potential issues for the appeal, such as trial counsel's failure to object to photographs or crime scene evidence, because trial counsel's performance with respect to these matters was not deficient and did not amount to reversible error or error at all.

The court found no factual or legal support for excusing the procedural bar with respect to the IAC claims not raised on direct appeal. The court concluded that Roedel's appellate counsel made a reasonable and sound professional decision in determining which issues to raise on appeal. The court further rejected Roedel's claim that his appellate counsel should have investigated the legitimacy of the California proceedings to which his trial counsel referred during voir dire. Roedel, ¶¶ 40-44. The court found that any further investigation would have had no relevance to the trial or the appeal.

The court then turned to Roedel's claim that his appellate counsel was ineffective because she failed to provide him with a separate copy of the trial

transcript during the direct appeal. The court noted that Roedel failed to show how his ignorance of the material in the transcript affected the arguments made on appeal or the outcome of the appeal proceedings. The court found no factual support for this IAC claim.

Addressing Roedel's contention that his appellate counsel was ineffective for failing to raise an equal protection argument on appeal, the court noted that there was no equal protection violation argued in the trial court, which precluded the argument on appeal. The court concurred with appellate counsel's conclusion that Roedel's equal protection claim was not viable in any event.

The court looked to trial counsel's affidavit to reject various nonrecord based IAC claims against trial counsel, noting that trial counsel had made considerable efforts to investigate the circumstances of the shooting, including numerous visits to the crime scene, personal interviews of the state's experts at the crime lab, retention of a ballistics expert, and utilization of a defense investigator. The court observed that many of Roedel's claims related to his theory that the victim was in some location other than the stairway when she was shot. The court found Roedel's complaints rife with conjecture and speculation that the alleged missing evidence would have made a difference in the result of Roedel's trial. The court recounted all of the evidence showing that the victim was on the stairway

when Roedel shot her, and the court concluded that Roedel's contrary "theory" was based on pure speculation.

The court addressed Roedel's other "theory" that the victim fired the gun at him twice before he fired the shot that killed her. The court noted that the gunshot residue evidence obtained from the victim and Roedel was presented at trial, and the jury was aware of Roedel's theory. The court found no basis for concluding that the State suppressed any exculpatory evidence or that Roedel's trial counsel was ineffective as to the investigation of the theory.

Roedel claimed that his trial counsel was ineffective in failing to investigate the contents of the victim's computer and the extent of the victim's indebtedness. The court found this IAC claim to be illustrative of the speculative and unsupported nature of Roedel's allegations. The court noted that Roedel did not even allege how the victim's behavior had any bearing on her death or would have yielded a different outcome at the trial. The court found no factual or legal support for Roedel's claim that he is entitled to postconviction relief on the grounds that his trial counsel failed to properly investigate the crime scene, the weapon, or the victim's circumstances.

The court also rejected Roedel's claim that his trial counsel should have further investigated whether the phone in his bedroom was operational at the time of the shooting. The court found no suggestion that the information would have

made a difference in the outcome of the trial. Similarly, the court noted that Roedel's trial counsel had sufficiently presented the discrepancies between the witnesses as to the shots they heard at Roedel's residence, and the court could not find a reasonable probability that the result of the trial would have been different but for counsel's alleged shortcoming.

The court noted that Roedel's appellate counsel had raised an IAC claim against trial counsel based on the failure to challenge a prospective juror, Rod Meyers, for cause. This Court found that the claim was not sufficiently record based to be addressed on direct appeal. Although Roedel had notice that this Court did not resolve the claim, Roedel did not raise the claim again in his 45-page unverified amended petition. The court concluded that Roedel's IAC claim against trial counsel with respect to the Meyers matter was waived for purposes of postconviction review.

The court concluded that Roedel's claims in his amended petition are legally deficient and substantively without merit, and the court therefore denied postconviction relief.

B. Failure of Appointed Counsel

Roedel first argues in his brief that he received no benefit from the district court's appointment of attorney Glen Neier in the postconviction proceedings. As discussed above, the court made a conditional appointment of the Office of the

State Public Defender. The case was assigned to Neier, who advised the court of the conflict arising from Roedel's allegations of IAC against his appellate counsel. In addition, Neier stated that Roedel was not entitled to appointed counsel pursuant to Mont. Code Ann. § 46-8-104.

The district court determined that Roedel had presented his IAC claim against appellate counsel in his pro se amended petition, which was filed before the court made its conditional appointment. Since further amendment of the petition and an evidentiary hearing were not necessary, the court proceeded to order the State to respond to the petition. Neier was subsequently granted permission to withdraw.

Under § 46-8-104, a district court has discretion to order the State Public Defender to assign counsel to represent a postconviction petitioner, if the petitioner is eligible for appointment. While the statute requires an appointment in certain circumstances, none of the statutory circumstances was shown to exist, and Neier was correct in asserting that Roedel was not entitled to appointed counsel at that juncture in the proceedings. Roedel cannot claim that he was denied the effective assistance of counsel in the postconviction proceedings, since he had no constitutional right to the assistance of counsel in the first instance. In re Petition of Martin, 240 Mont. 419, 420, 787 P.2d 746, 747 (1989); Mont. Code Ann. § 46-21-105(2).

The district court did not abuse its discretion with respect to Roedel's request for appointed counsel in the postconviction proceeding.

C. Response to State Rationale

In this section of his brief, Roedel takes issue with the district court's comment that his petition does not comply with the requirements of Mont. Code Ann. § 46-21-105(2). While Roedel did provide a copy of the trial transcript with his petition, the court was correct in noting that Roedel did not support his off-record IAC allegations against trial and appellate counsel with affidavits or other evidence.

This section contains a scattering of allegations and accusations, most of which are adequately addressed in the district court's order. Roedel complains that his appellate counsel did not raise a multitude of issues that might have been raised on appeal, but he fails to recognize that Strickland does not require appellate counsel to raise every colorable claim in the appeal in order to render effective assistance. Petition of Martin, *supra*. Roedel's appellate counsel, Joslyn Hunt, submitted an affidavit describing the process of determining the issues to be presented in the appeal, which included regular consultation with Roedel. As the district court noted, Hunt carefully considered the various issues to determine which had the best chance of success on appeal. Hunt also described the reasons her office could not provide a copy of the trial transcript to Roedel while the appeal

was pending. The district court correctly concluded that Hunt's representation was not constitutionally deficient or prejudicial to Roedel.

Roedel also suggests that his trial attorney, Jack Quatman, engaged in "foul conduct" when he stated in his affidavit that Roedel did not mention the victim's computer or ask him to have it analyzed. He points to references to the computer in his recorded interviews with the investigating detective. However, Roedel misreads Quatman's affidavit, which does not deny knowledge of the computer but simply asserts that Roedel did not specifically request Quatman to have it analyzed. The district court correctly concluded that even if Roedel had made such a request, it would be pure speculation to suggest that the computer analysis would have yielded any relevant evidence for the defense.

In conclusory fashion, Roedel labels certain unidentified conduct of the State as "shameful" and "unethical" and suggests that the prosecutor obtained his conviction through use of false evidence. But the record supports a contrary conclusion; the evidence against Roedel was thoroughly examined and tested during the trial, and Roedel's only complaint is that the jury did not accept his theory of what the evidence demonstrated. The jury resolves disputes about the evidence and the credibility of witnesses, and the existence of such conflicts does not provide grounds for postconviction relief. State v. Rennaker, 2007 MT 10, ¶ 16, 335 Mont. 274, 150 P.3d 960.

D. The State’s “Firing All Three Shots” Theory

In the next section of his brief, Roedel departs from the IAC claims in his amended petition to devote considerable attention to his theory that the victim fired the gun during the altercation and that Roedel did not fire all three shots. Roedel suggests that he was coerced into agreeing with the investigator, the neighbors, and the media accounts that because the shots were fired in rapid succession, he must have fired all three shots himself. Roedel suggests that the State’s “three shots” theory was a hoax concocted by the prosecutor and based on fabricated evidence.

The district court discussed this claim, which was raised primarily in Roedel’s rebuttal pleadings, at page 7 of its Order and Rationale. The court noted that the evidence concerning the various theories on the firing of the shots was presented to the jury, and the court concluded that the State had not suppressed exculpatory information and Roedel’s trial counsel had not been ineffective in his investigation of the matter.

Although Roedel attempts to characterize the prosecutor’s closing comments on the matter as misconduct, it is clear that the cited comments are well within the permissible scope of argument. A prosecutor is permitted to comment on contradictions in the testimony and to suggest inferences that the jury may draw from the evidence. State v. Makarchuk, 2009 MT 82, ¶ 24, 349 Mont. 507, 204 P.3d 1213. The comments do not amount to an impermissible opinion of

Roedel's guilt or veracity. In any event, the propriety of the prosecutor's closing argument could reasonably have been raised as an issue in the direct appeal, and the issue may not be asserted independently as grounds for postconviction relief.

E. The Rapid Fire Testimony

In this section of his brief on appeal, Roedel steps outside the record to make the claim that the Klievs' testimony concerning the gunshots they heard was manufactured evidence that should not have been admitted. At page 9 of its Order and Rationale, the district court considered the claim in the context of Roedel's IAC allegation against trial counsel. Roedel complained about counsel's failure to cross-examine the Klievs concerning a feud that allegedly existed between Roedel and the Klievs. The district court noted that counsel had pointed out to the jury the discrepancies between testimony by the Klievs and testimony by other neighbors about the number and timing of the gunshots. The court also noted that Roedel had not submitted an affidavit or other evidence to suggest that a feud existed or that his counsel was aware of the feud. The court determined that it could not conclude counsel's performance fell below an objective standard of reasonableness or that the result of the trial would have been different if counsel had acted differently.

Notwithstanding Roedel's speculation about misconduct by the media and by the police, the district court correctly resolved the IAC claim based on the record before it. The record contains no support for Roedel's claim of false

evidence or a fabricated theory, and the court properly rejected the claim, whether it is viewed as an IAC claim or a separate due process violation.

F. Deceased on Exterior When Shot

Roedel lapses into a first-person narrative in this section of the brief, describing the evolution of his thoughts about the location of the victim at the time she was shot. However, he does not show that the district court's findings and conclusions, at pages 6-7 of the Order and Rationale, were clearly erroneous or legally incorrect. The evidence, including Roedel's own statements, strongly supports the conclusion that Dawn was in the stairway when Roedel shot her. Roedel's speculation in his pleadings did not establish IAC or any other grounds for postconviction relief.

G. Wrongful Arrest

Roedel claims that he was wrongfully arrested after he had told the responding officers that he had shot his wife in the back as she went down the stairs. He contends that he was arrested prematurely and should have been released once the gunpowder residue tests showed that his wife had shot the gun.

This claim was not addressed by the district court and is apparently presented here for the first time on appeal. To the extent that the claim represents a change in legal theory, this Court may properly decline to consider whatever merits it may have. State v. Godfrey, *supra*, ¶ 41. In any event, it is clear that the police

had probable cause to arrest Roedel in view of the crime scene and Roedel's statements. State v. Bennett, 158 Mont. 496, 499, 493 P.2d 1077, 1078 (1972).

The cases cited by Roedel do not support an argument that Roedel was wrongfully arrested or detained.

H. Insufficiency of Evidence

In another attempt to recast the evidence and retry the case, Roedel argues that the State had no evidence to arrest and prosecute him for deliberate homicide. However, the sufficiency of the State's evidence was raised as an issue on appeal, and this Court rejected Roedel's argument. Even if it had been raised as a postconviction claim separate from the IAC claim, the district court would have properly viewed the insufficiency claim as procedurally barred from postconviction review. Mont. Code Ann. § 46-21-105(2).

I. Misdirected Analysis of Website and Character

Roedel's argument in this section of the brief centers on the victim and speculates that the police knew about, and suppressed, evidence of her personal debt, her sexual orientation, and other activities that could be viewed as motivation for her to shoot Roedel. At page 8 of the Order and Rationale, the district court addressed Roedel's argument in the context of his IAC claim against his trial counsel, finding that counsel had conducted a reasonable investigation of Roedel's allegations about the victim. The court observed that the allegations were based on

speculation and concerned aspects of the victim's life that would not have been relevant to the issues in the homicide trial.

Roedel recasts this argument as a stand-alone claim of police misconduct, based largely on his personal beliefs about the evidence, and this Court may properly decline to review the changed legal theory raised for the first time on appeal. Like the IAC claim, the new theory of police misconduct and suppression of evidence is pure speculation that is not supported by the record.

J. Two Exit Hole Accounts

As in the previous sections of his brief, the “two exit hole accounts” section departs from Roedel's IAC claims in his amended petition and presents Roedel's personal conclusions about the evidence of the exit wound from the bullet that killed the victim. While Roedel's argument might be more appropriate for a jury than for an appellate court, it is unclear to what end the argument is being made. Roedel apparently attempts to convert the argument into a claim of prosecutorial misconduct, but the claim was not included in the amended petition or addressed by the district court. In any event, Roedel's different view of the evidence does not constitute grounds for postconviction relief.

K. Rod Meyers' Jury Influence

Mixing in various claims of due process violations and juror bias, Roedel argues that a voir dire comment by Rod Meyers, a prospective juror, should have

caused the district court to dismiss the entire jury panel. This claim was specifically raised as an IAC claim in Roedel's direct appeal. This Court concluded that the trial record was insufficient to resolve the IAC claim. Roedel, ¶¶ 36-39. Because Roedel did not present the claim in his amended petition for postconviction relief, the district court deemed the claim to be waived. The court was correct. Mont. Code Ann. § 46-21-105(2).

L. Attempt on Petitioner's Life

Roedel argues in this section that the evidence supported the conclusion that the victim made an attempt on his life. As with his other claims on appeal, Roedel does not challenge any of the district court's findings and conclusions with respect to this argument, since it was not raised as a separate claim for postconviction relief and therefore was not addressed by the district court. On appeal, the claim appears to be framed as a complaint against the police, or perhaps the prosecutor, but in any event the argument, for whatever purpose it is offered here, has not been preserved for this appeal.

Roedel's attempt to rely on recent legislative changes to the statutes on justifiable use of force is unavailing. The statutes were amended in 2009 and do not apply to his offense, which was committed in 2005. Roedel did not assert the affirmative defense of justifiable use of force, and he did not present a mitigation argument to the jury. The jury heard evidence, including Roedel's initial

statements to law enforcement and testimony on the gunshot residue, that supported his claim that the victim fired the gun. Even if the Court were to consider Roedel's argument outside the IAC context, Roedel has not asserted any grounds sufficient to require postconviction relief from his homicide conviction.

M. Immediate Collapse Theory

Under this heading in his brief, Roedel again reargues the evidence in an attempt to show that the victim did not immediately collapse after Roedel shot her. Notwithstanding his baseball analogy, Roedel's argument does not present any independent grounds for postconviction relief. At pages 6-7 of the Order and Rationale, the district court addressed the same or similar theory in the context of Roedel's IAC claim that his trial attorney failed to investigate the location at which the victim was shot. The court's findings and conclusions are well supported in the record, and Roedel does not challenge them in this appeal.

N. Side Impact Theory

Continuing in the same vein, Roedel gives his own interpretation of the evidence to reach the conclusion that the police tampered with one of the bullet holes and failed to conduct sufficient measurements and tests on the recovered bullets. Again, this argument was not presented as a separate postconviction claim, is premised on pure speculation, and need not be addressed by this Court on appeal.

O. Summary

Roedel summarizes his appeal by alleging that the State's evidence was nothing more than fabrication and perjured testimony. While Roedel is entitled to his opinion about the state of the evidence, his opinion does not constitute grounds for postconviction relief. The record before the district court supports the court's conclusion that the State, including the police and the prosecutor, did not suppress any evidence, engage in misconduct, or otherwise violate any of Roedel's rights during the investigation and prosecution of the case. More on point, Roedel's attorneys, both at trial and on appeal, did not perform deficiently or prejudicially in defense of the charge against Roedel. This Court should find no reason to disturb the district court's ruling.

CONCLUSION

The district court's denial of Roedel's amended petition for postconviction relief should be affirmed.

Respectfully submitted this 24th day of March, 2010.

STEVE BULLOCK
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: _____
JOHN PAULSON
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. Lawrence Roedel
AO# 2110712
50 Crossroads Drive
Shelby, MT 59474

Mr. Ed Corrigan
Flathead County Attorney
Justice Center
P.O. Box 1516
Kalispell MT 59903-1516

DATED _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

JOHN PAULSON

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0614

LAWRENCE ROEDEL,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPENDIX

Order and Rationale on Amended Petition for Postconviction Relief	Appendix A
Affidavit of John R. Quatman.....	Appendix B
Affidavit of Joslyn Hunt	Appendix C